Filed 2/23/17 P. v. Velasquez CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DANIEL VELASQUEZ, Defendant and Appellant.	F072195 (Super. Ct. No. BF137599A) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Michael B. Lewis, Judge.

Susan L. Jordan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Barton Bowers, for Plaintiff and Respondent.

-ooOoo-

[*] Before Levy, Acting P.J., Peña, J. and Smith, J.

Appellant Daniel Velasquez appeals from proceedings related to his sentence for carjacking (Pen. Code, § 215, subd. (a))[1] and robbery (§ 212.5). Appellant contends the trial court wrongly denied a motion under Proposition 47 (§ 1170.18) to modify his sentence. Appellant claims the fact several of his prior felony convictions were subsequently reduced to misdemeanors through separate Proposition 47 proceedings means those convictions must be struck from consideration in his current sentence because they may no longer form the basis for prior prison term allegations under section 667.5, subdivision (b). For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 6, 2012, appellant was sentenced to a term of 20 years following his conviction on charges of carjacking and robbery. Appellant was sentenced to the midterm of 10 years on the carjacking charge, with a five-year enhancement under section 667, subdivision (a), and five, one-year enhancements under section 667.5, subdivision (b).[2] The sentence imposed on the robbery charge was stayed.

In subsequent and separate proceedings, at least some of the felony convictions supporting appellant's five, one-year prior prison term enhancements were reduced to misdemeanors pursuant to Proposition 47.

Appellant then moved for relief from his current carjacking sentence under Proposition 47, alleging that since some of the prior prison term enhancements were no longer felonies, they could not be included in his sentence.

The trial court denied relief, questioning whether it had jurisdiction to begin with, but ultimately finding the prison priors were valid at the time of sentencing and would not be retroactively modified.

---

1 All future statutory references are to the Penal Code unless otherwise noted.

2 From the record provided on appeal, these enhancements appear to have arisen from prior convictions in the following case numbers in various different counties: OCR9475, SC035591A, 15442, 16658, and CF-3186.

This appeal timely followed.

DISCUSSION

Standard of Review and Applicable Law

"In November 2014, California voters enacted Proposition 47, which 'created a new resentencing provision: section 1170.18. Under section 1170.18, a person "currently serving" a felony sentence for an offence that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. [Citation.] A person who satisfies the criteria in section 1170.18 shall have his or her sentence recalled and be "resentenced to a misdemeanor ... unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." ' " (*People v. Rivas-Colon* (2015) 241 Cal.App.4th 444, 448 (*Rivas-Colon*).)

Subdivision (k) of section 1170.18, provides in pertinent part: "Any felony conviction that is ... designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes, except that such resentencing shall not permit that person to own, possess, or have in his or her custody or control any firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6."

The trial court is tasked with determining whether a petitioner is eligible for resentencing. (§ 1170.18, subd. (b).) However, a petitioner has the initial burden of introducing facts sufficient to demonstrate eligibility. (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879-880.)

As the trial court's eligibility determination is factual in nature, we review that determination for substantial evidence. (*People v. Johnson* (2016) 1 Cal.App.5th 953, 960; see also *People v. Hicks* (2014) 231 Cal.App.4th 275, 286; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1331; *Rivas-Colon*, *supra*, 241 Cal.App.4th at p. 452, fn. 4

[“ ‘[T]he basic structure of Proposition 47 is strikingly similar to Proposition 36’ and ‘much of the appellate interpretation of Proposition 36 is likely relevant in the interpretation of Proposition 47.’ ”].)

The Trial Court Did Not Err in Denying Appellant’s Motion

As an initial matter, this case is properly disposed of on jurisdictional grounds. Appellant’s motion for relief under Proposition 47 has no statutory basis upon which it can proceed. Appellant’s conviction for carjacking is not eligible for relief under Proposition 47, as it has not been reduced to a misdemeanor by any of the changes enacted by Proposition 47. (§ 1170.18, subd. (a).) His petition was therefore properly denied.

However, even considering the merits of appellant’s argument, appellant’s request was properly denied. The question raised in this appeal is whether Proposition 47 operates retroactively such that appellant’s current sentence, enhanced pursuant to section 667.5, subdivision (b), must now be altered because subsequent to appellant’s sentencing the convictions that gave rise to those enhancements were reduced to misdemeanors pursuant to section 1170.18, subdivision (f). This question has been previously considered by this court and answered in the negative. That case, and several discussing the same issue, are now on review before the California Supreme Court.[3]

There is no need to fully recount the analysis previously laid out by this court. In sum, there is no evidence of a voter intent to make Proposition 47 retroactive in the context of section 667.5, subdivision (b). Neither Proposition 47 nor the ballot materials refer to section 667.5, subdivision (b) or mention recidivist enhancements, and Proposition 47 made no amendments to any such provisions. Two of Proposition 47’s expressly stated purposes, however, are to “[a]uthorize *consideration* of resentencing for

---

3 See, e.g., *People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted March 30, 2016, S232900; *People v. Ruff* (2016) 244 Cal.App.4th 935, review granted May 11, 2016, S233201.

anyone who is currently serving a sentence for any of the offenses" that would be made misdemeanors by Proposition 47, and to "[r]equire a thorough review of criminal history and risk assessment of any individuals before resentencing to ensure that they do not pose a risk to public safety." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47, § 3, subds. (4), (5), p. 70, italics added.) Voters were assured Proposition 47 would keep dangerous criminals locked up (Voter Information Guide, Gen. Elec., *supra*, argument in favor of Prop. 47, p. 38), and that it would not require automatic release of anyone: "There is no automatic release. [Proposition 47] includes strict protections to protect public safety and make sure rapists, murderers, molesters and the most dangerous criminals cannot benefit." (*Id.*, rebuttal to argument against Prop. 47, p. 39.)

"Imposition of a sentence enhancement under ... section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction." (*People v. Tenner* (1993) 6 Cal.4th 559, 563.) "Sentence enhancements for prior prison terms are based on *the defendant's status as a recidivist, and not on the underlying criminal conduct*, or the act or omission, giving rise to the current conviction." (*People v. Gokey* (1998) 62 Cal.App.4th 932, 936, italics added; see *People v. Coronado* (1995) 12 Cal.4th 145, 158-159; *People v. Dutton* (1937) 9 Cal.2d 505, 507.) Thus, the purpose of an enhancement under section 667.5, subdivision (b) "is 'to punish individuals' who have shown that they are ' "hardened criminal[s] who [are] undeterred by the fear of prison." ' " (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115.) The enhancement's focus on the service of a prison term "indicates the special significance which the Legislature has attached to incarceration in our most restrictive penal institutions." (*People v. Levell* (1988) 201 Cal.App.3d 749, 754.)

A person who refuses to reform even after serving time in prison is clearly and significantly more dangerous than someone who merely possesses drugs for personal use

or shoplifts. We cannot conclude, from the language of Proposition 47 or the ballot materials, that voters deemed such persons to be nonserious, nondangerous offenders, and so intended Proposition 47 to reach back to ancillary consequences such as enhancements resulting from recidivism considered serious enough to warrant additional punishment.

Nor do cases cited by appellant such as *People v. Park* (2013) 56 Cal.4th 782 and *People v. Flores* (1979) 92 Cal.App.3d 461 change this conclusion. Such cases, in contrast to the situation here, involved sentencing decisions occurring *after* reduction of a previous felony to a misdemeanor. Nothing in these cases, or in Proposition 47, suggests sentencing occurring *prior* to any reduction of a previous felony conviction should be affected. Appellant served prison terms for the prior convictions at a time when the offenses were felonies. It is the service of those prison terms, coupled with appellant's continuing recidivism, that section 667.5, subdivision (b) punishes. Absent a clear statement of the electorate's intent to the contrary—which we do not find—we conclude that, because appellant served prison terms at a time when the offenses were felonies, and had his current sentence enhanced accordingly, before the convictions were reduced, he is not entitled to relief.

DISPOSITION

The judgment is affirmed.